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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 321.

THE CREEK NATION, *Petitioner*,

v.

THE UNITED STATES.

No. 322.

THE SEMINOLE NATION, *Petitioner*,

v.

THE UNITED STATES.

On Writs of Certiorari to the Court of Claims.

PETITION FOR REHEARING.

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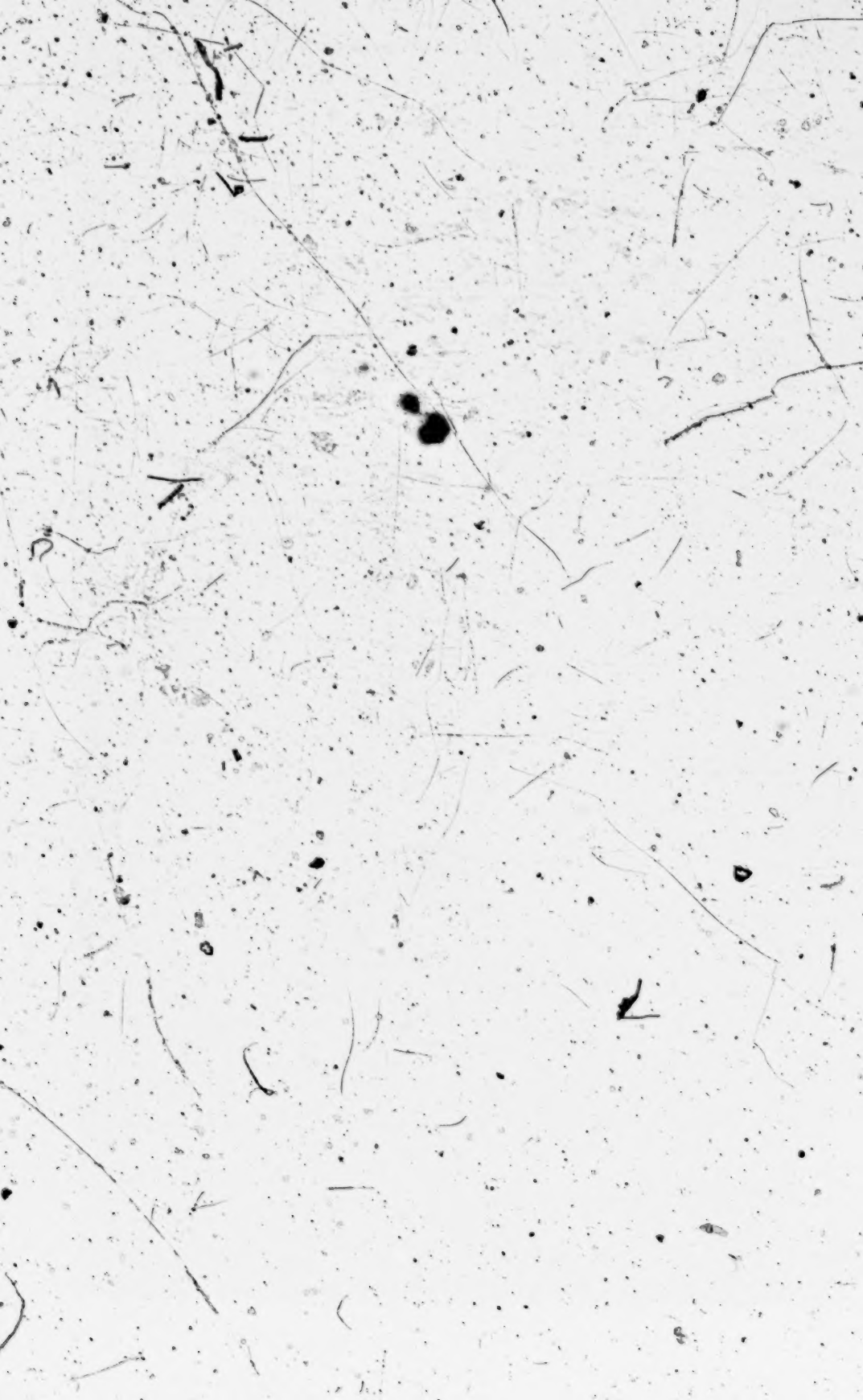

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On Writs of Certiorari to the Court of Claims.

PETITION FOR REHEARING.

The Creek and Seminole Nations of Indians, by counsel, respectfully petition this Honorable Court for a rehearing of the above entitled cause, on the following points set forth in the majority opinion of April 5, 1943:

1. That the covenant of quiet possession contained in the Creek and Seminole treaties of 1866 does not by necessary implication give rise to an action for damages for losses incurred by the breach of same by the United States, the contracting party and the guardian of petitioners;

2. That the tribes have a general legal right to sue in the courts of the United States to protect their own interests in the absence of legislative authority giving them that right; and that having such right, these Indian wards were expected to assume the burden of protecting their own interests while under the guardianship of the United States.

We will discuss briefly these points in the order of their statement.

1.

The jurisdictional acts of May 20, 1924, c. 162, 43 Stat. 133, and May 24, 1924, c. 181, 43 Stat. 139, authorize the Creek and Seminole Nations of Indians to adjudicate all legal and equitable claims arising under or growing out of treaties, agreements and acts of Congress, which said tribes may have against the United States. The Act of August 16, 1937, c. 651, 50 Stat. 650, provides for the adjudication of all legal and equitable claims presented by amended petition on file in the Court of Claims at the time this act was passed. The petitions were then on file. When Congress passed these jurisdictional acts, it did not limit the right of petitioners to sue solely upon claims wherein the United States had expressly promised indemnity for violations of its treaty obligations. But all legal and equitable principles were made available to petitioners in the presentation of their claims.

The basis for all liability, both legal and equitable, is a violation of a right which arises either by contract or by virtue of a duty owed by one party to another. For the resulting loss the law provides reparation usually in the form of damages. The recovery of damages is not made contingent upon the wishes of the party violating the right, but the law independently imposes the liability upon the party violating the right.

Does not the majority opinion make the right of petitioners to recover contingent upon the promise of the wrongdoer to pay, and overlook the obligations imposed by the *law* upon him?

The Creek and Seminole treaties of 1866 provide that "the United States guarantees them quiet possession of their country." With respect to this guarantee, which the demurrer admits was violated by the United States, the Court states as follows (Op. p. 3):

> "We conclude that, whether or not the guarantee is limited to military protection this language did not obligate the United States to compensate the tribes for encroachments by railroads acting under color of right. Keeping the peace and protecting the Indians was a difficult, and at times almost impossible, task, and we cannot assume that the government meant to guarantee reparations for breach of quiet possession without a single explicit word in the Treaty to that effect."

Would it have been a difficult matter for the administrative officers to order the railroads to give up Indian lands which they had never used for railroad purposes? As all of these railroads were directly supervised by the officers of the United States and all of the arrangements with said railroads were made directly with the United States we submit that such administrative action would have brought about the desired result, and the interests of these Indian wards would have been amply protected.

Does not the above conclusion of the majority of the court make the right of recovery for a wrong depend entirely upon the wishes of the wrongdoer? If the Government makes a solemn treaty promise to its dependent Indian wards, and it violates that promise, and causes loss to the estate of its ward, then the loss cannot be requited because the wrongdoer did not agree that it would pay damages for the treaty violation. This is not true in other cases, and we submit that it is a rule wholly foreign to legal and equitable jurisprudence. In fact, one of the maxims of Equity is that "Equity will not suffer a wrong without a remedy". Does not the above quoted conclusion set up the Government as a privileged party in litigation, irrespective of the principle that when the Government consents to be sued it comes into court as a common litigant?

Certainly in any suit by the ward against the guardian, recovery is not made contingent upon the showing that the guardian promised to indemnify the ward for losses caused by the guardian's failure to do his duty with respect to the trust estate. Nor do we believe that in any suit on a simple contract that it is necessary to establish anything more than the promise or duty created by the contract and a breach thereof resulting in loss, in order to recover damages. Surely recovery is not made contingent upon the promise of the wrongdoer that he will indemnify the injured party in case the duty is breached. We submit that the law, imposes the liability, and the recovery of damages is not contingent upon the promise of the wrongdoer to pay.

The guarantee of quiet possession was made to an unlettered people and is to be construed in the manner in which it would naturally be understood by them. It meant more to them than the money consideration provided by the treaty. The history of these tribes shows that this protection was their chief concern. They had been driven from their homes in the east and had sought a quiet haven from the white intruders in the country west of the Mjssissippi, and these promises of protection induced them to remove. In their treaty of August 7, 1856, 11 Stat. 699, the United States agreed to remove all trespassers from their domain, and to use the military forces for this purpose, if necessary. When the Civil War began the military protection was withdrawn from the Indian territory and their homes were overrun. They found themselves involved in a war which they had no part in creating (1862 Rept. Comr. Ind. Aff., pp. 142-143; Ibid., 1863, p. 185). The United States Agent for the Seminoles, in reviewing this period stated in part as follows (1869 Rept. Comr. Ind. Aff., pp. 417, 418):

> * * * They were driven from their homes, their property destroyed, their houses burned, and their stock driven off without compensation to their lawful owners. * * * Opothleyohola, with a band of loyal Creeks and Seminoles, in midwinter started with their

women and children for Kansas, a distance of more than three hundred miles. Without adequate food and clothing they traveled on their weary march. They were pursued by men of their own race, and the bloody battles of Cedar and Bird Creeks attest the courage and patriotism of that good old man and his faithful followers. Freezing, starving and dying, they at length reached Kansas, and their able-bodied men immediately enlisted in the service of the government; and the history of the three Indian regiments present as honorable record as any of all the noble army that served the nation. When the war ended they were destitute and scattered from the Red River to Kansas. Again they sought the protection of the government. They formed new treaties; they complied with all the conditions imposed upon them; * * * They took hold of the question of reconstruction and settled it at once, practically, peaceably, and firmly. They have reopened their schools and churches; have re-built their homes, and are fast becoming surrounded by stock, farms, and all the comforts of life. With such a record should not the government repay them for their losses, faithfully and promptly carry out all their treaty stipulations, repel the encroachments of white men, and pay them for their lands, and see that justice is done them in all their intercourse with white men?"

As a part of the consideration of the new treaties of 1866 the United States again promised them protection. In the instructions of James Harlan, Secretary of the Interior to the United States Treaty Commissioners, dated August 16, 1865, it is stated (American Indian under Reconstruction by Annie Heloise Abel, Slave Holding Indians, Lib. Cong. No. E 540.I3A22, p. 223):

"To secure to the tribes the absolute and undisturbed possession of the Indian Territory, a clause should be inserted in the treaty, prohibiting any white person, except officers, agents and employees of the government, from going to or settling in said territory; unless formally admitted and incorporated into some one of the tribes lawfully residing there, according to its laws and usages."

The former promises of the United States to remove all white intruders and trespassers, made in the 1856 treaty (Art. 15, 11 Stat. 699), were reaffirmed and carried forward in the treaties of 1866 (Art. 9, 14 Stat. 755; Art. 12, 14 Stat. 785); and as a further protection the United States solemnly agreed to guarantee them quiet possession of their country. This was a promise looking to the future. Did this guarantee mean anything?

The majority opinion further states (Op. p. 4):

> "This conclusion does not mean that the United States in signing the treaty made an empty promise. * * The guarantee of quiet possession called for a series of legislative, administrative and military judgments, but was not a pledge of monetary reparation."

The court further emphasized the fact that this action was brought against the Government and not against the railroads which have committed the asserted misdeeds (Op. p. 2). This guarantee of quiet possession, and the promise to remove intruders and trespassers were not made by the railroad companies to the petitioners, but were made by the United States directly to these Indian wards. Therefore, suit on this phase of the case could not have been brought against the railroads, but solely against the United States.

These tribes had made no arrangements directly with the railroads, but all of the arrangements with the railroads were made by the United States. The treaties of 1866 granted rights of way to two railroads only, which, when duly authorized by Congress, and with the express consent and approbation of the Secretary of the Interior, shall undertake to construct a railroad through the domains of these tribes. The color of right of the railroads therefore did not spring from an arrangement made with the tribes directly, but was acquired through arrangements made directly with the United States.

If the guarantee of quiet possession, and the promise to remove intruders meant nothing but legislative, adminis-

trative and military judgments, which failed to give the tribes the quiet possession so solemnly promised, and the tribes suffered loss as a result of this failure, would not a construction that no monetary recovery may be had thereunder result in making the guarantee of quiet possession nothing but "sounding brass, or a tinkling cymbal"?

Should this great nation of ours be excused from liability for a loss caused by the violation of its treaty obligations, for the reason that the promises made by treaty were difficult of execution?

We respectfully submit that for the failure to afford the protection guaranteed by solemn treaty obligation—the one important factor which induced the Indians to treat with the United States—the law imposes an obligation on the party causing the loss to make money reparation, and that such reparation is not contingent upon the promise of the wrongdoer to be liable in case it violated its solemn treaty obligation.

2.

The majority opinion states in part as follows (Op. p. 8):

> "That the government did not mean to assume an insurer's responsibility for the payment of sums claimed by the Indians against the railroads is further shown by the fact that the Indians retained their own independent remedy for wrongs done them. The tribes have not yet been dissolved, and they have had, both as a general legal right and by virtue of the very section of the 1906 Act under discussion here, the power to bring actions on their own behalf. That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions."

Since the Court's opinion we have again carefully reviewed the cases cited by the Court in support of its holding that the tribes had a general legal right to sue on their own behalf.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294, was a suit brought to test the constitutionality of the Curtis Act, and involved the power of the Secretary of the Interior to lease tribal lands under this act. The case was brought by vari-

ous parties plaintiff, and the Cherokee Nation was joined as a party plaintiff. The right of the tribe to sue was not questioned, and the court did not pass upon this question.

Lone Wolf v. Hitchcock, 187 U. S. 553, was a class suit in which the question of the right of the tribe to sue was not raised and therefore was not passed upon. The question in this suit was whether a subsequent act of Congress could vary the terms of a prior Indian treaty.

Lane v. Pueblo of Santa Rosa, 249 U. S. 110, and *United States v. Candelaria*, 271 U. S. 432, were cases authorized by the territorial laws of New Mexico, which gave the Pueblos the right to sue, and these territorial laws were sanctioned by act of Congress. Therefore, the right of these tribes here to sue rested on statutory authority.

We submit that none of these cases held that an Indian tribe had a general legal right to sue to protect its own interests in the absence of any enactment of Congress giving it that right.

The Constitution of the United States (Art. 1, Sec. 8) gave Congress the power to regulate commerce with foreign nations and with the Indian tribes. These Indian tribes being under the control of Congress, would have only such rights and privileges that were conferred upon them by Act of Congress or by treaty. In our supplemental memorandum we reviewed the treaties and acts of Congress, and were unable to find where these tribes had ever been given the general legal right to sue to protect their own property interests.

The Act of February 28, 1902.

Clearly the Act of February 28, 1902, c. 134, 32 Stat. 43, did not give the tribes any such right. Section 15 provided for an appeal to the courts in cases of disputes over the amount of damages to be paid for lands taken for railroad purposes. Section 16 provided that the railroads pay to the Secretary of the Interior for the benefit of the tribes $15.00 per mile per annum for each mile of road con-

structed, as compensation for the right of user. The court refers to an opinion of the Secretary of the Interior with respect to this annual charge (footnote 5, p. 2). As the cases are before the Court on demurrer petitioners have not presented their views with respect to the correctness of this opinion.

The Act of 1902 was an arrangement made by the United States directly with the railroads. Although this act disposed of lands of these Indian tribes, yet their rights and wishes were not consulted. However, Congress provided certain benefits for the tribes whose lands were affected. Certainly the guardian, who alone made the arrangements with the railroad companies, would be the proper party to enforce these benefits for its Indian wards. Especially would this be true when the United States had assumed full administrative control over all of the property and affairs of these tribes under the provisions of the Curtis Act, approved June 28, 1898, c. 517, 30 Stat. 495, and under the subsequent agreements made with these tribes (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294).

At this time these were an unlettered people, with few enlightened men among them. Even today these Indians find the ways of white men difficult to comprehend. Is it to be presumed that these dependent people with their limited understanding would have the ability to enforce laws of which they knew nothing and had no part in creating?

Had the tribes sued the railroad companies for the $15.00 per mile charge under Section 16 of the Act of 1902, the railroads would have defended on the ground that the Act provided that the Secretary of the Interior receive this money, and that under the statute the Indian tribes were not the proper parties to enforce this provision and collect this money.

The Act of April 26, 1906.

We have again reviewed the provisions of the Act of April 26, 1906, c. 1876, 34 Stat. 137, and are unable to find where the Indian tribes have been given the authority to sue generally to protect their own interests. In fact, the whole import of the act gives the Secretary of the Interior the right to do so. Section 11 states that the Secretary *shall* collect all revenues due these tribes, and Section 18 authorized him to bring suit to enforce these collections. Section 18 did not modify the powers granted the Secretary by Section 11, but merely provided the means by which the Secretary could enforce the duty imposed upon him by Section 11. As pointed out in our supplemental memorandum (pp. 12-13), in a few instances the tribes were given the right to proceed in the courts on their own behalf, chiefly in matters affecting enrollment, and under Section 18 pending cases were permitted to proceed to final disposition. We were unable to find where Section 18 grants these tribes any right to sue generally in the court to protect their own interests.

We submit that had the tribes sued the railroad companies they would again have been met by the defense that the Secretary of the Interior alone was given the right to collect these amounts under the Act of 1906, and that these tribes had no such power.

Even though it be held that these Indian tribes had been given the general right to sue in the courts of the United States to protect their own interests, were these wards of our Government expected to assume that burden? Mr. Justice Vandevanter, an outstanding authority on Indian law, who perhaps decided more cases involving the affairs of these tribes than any other Judge, having as a background the knowledge of all laws affecting these tribes, wrote the opinion of this Court in *The United States* v. *The Creek Nation*, 295 U. S. 103, in which this court stated (p. 110):

> "True, the tribe, if free and prepared to proceed in its own behalf, might have successfully assailed the dis-

posals; but it was not in a position where it could be expected to assume that burden. It was in a state of tutelage and entitled to rely on the United States, its guardian, for needed protection of its interests. Plainly the United States would have been entitled to a cancellation of the disposals had it instituted suits for that purpose. * * *".

We submit that the above statement, and the dissenting opinion herein, follow the long line of decisions of this Court reflecting the broad view that the United States owes to its dependent Indian wards the duty of protection, and that these tribes, even if free to act on their own behalf, could not be expected to assume that burden.

The Court predicates its conclusions with respect to the claims under the Acts of 1902 and 1906 upon its failure to find that the Government assumed the contractual obligations of an insurer or guarantor of the collection of the money due these tribes from the railroad companies (Op. pp. 5, 7).

The petitioners' contentions were based upon the failure of the Government, as guardian, to protect properly the wards' property interests. When it acted independently with respect to the property of these tribes, made arrangements with railroad companies to use their lands, and provided benefits for them, we submit that it was in duty bound to collect these benefits for its Indian wards.

The petitions alleged, and the demurrer admits, that the United States failed, neglected, and refused to collect the amounts due petitioners from the railroad companies. All matters of defense, such as those mentioned by the Court on page 8 of the opinion, would not be under consideration on demurrer.

Certainly liability for the violation of a duty owed by the guardian to the estate of its ward, arises by virtue of the well settled principles of equity, which govern the duties of the guardian of its dependent Indian wards.

We submit that the United States is required to show that it acted with reasonable diligence in managing the trust estate. Herein no such showing is made.

In Bogert, Trusts & Trustees, Vol. 3, Sec. 592, pp. 1867-1868, it is stated:

> "As a portion of the process of assuming control of the trust property, the trustee has the duty of collecting choses in action which are a part of the trust estate. If he finds among the assets of the trust notes, bonds, mortgages, checks, drafts, judgments, or other contract or tort claims, he should proceed with reasonable diligence to collect as much money as possible from the obligors. For a failure to act toward this end with reasonable skill and celerity, the trustee will be liable. * * *" (Cases cited.)

We respectfully submit that the petitions state equitable claims against the United States within the meaning of the jurisdictional acts of 1924 and 1937.

CONCLUSION.

Because of the broad general views heretofore taken by this Court in many of its prior decisions involving the duties of the United States to its dependent Indian wards, we felt justified in submitting these matters for the further consideration of the Court.

We certify that this petition is submitted in good faith, and not for delay.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 321, 322.—October Term, 1942.

321	The Creek Nation, Petitioner, vs. The United States.	On Writ of Certiorari to the Court of Claims.
322	The Seminole Nation, Petitioner, vs. The United States.	

[April 5, 1943.]

Mr. Justice Black delivered the opinion of the Court.

These actions were originally brought in 1926 under special jurisdictional acts of 1924, which gave the Court of Claims jurisdiction over claims under "any treaty or agreement between the United States" and these tribes.[1] The actions were based on a contention that the United States had breached its obligation as a guardian of its Indian wards in failing to collect the sums described below. The Court of Claims sustained a demurrer to the first complaint on the ground that the special jurisdictional acts permitted actions brought on specific statutory or treaty pledges only, and not actions brought on a wardship theory. 75 Ct. Cls. 873. The petitioners subsequently amended their complaints to comply with the requirements of the jurisdictional acts, alleging that the United States in specific statutes and treaties guaranteed to repay the Indians for the losses claimed to have been suffered. The Court of Claims sustained a demurrer to the second amended complaint on the ground that it did not state a cause of action, — Ct. Cls —, and we granted certiorari because of the importance of the questions raised in the administration of Indian affairs. The cases present the question whether the United States has assumed treaty or statutory obligations which require it to indemnify the Creek and Seminole nations for injuries alleged to have been suffered by them as a result of the seizure and use of their land by private railroad companies.

[1] 43 Stat. 133, 43 Stat. 139. See also the jurisdictional act of 1937, 50 Stat. 650.

By the treaties of 1866,[2] the Creeks and Seminoles granted a right of way to railroads which the United States might later authorize to construct and operate routes across their lands. They agreed to permit the railroads to buy strips up to three miles in width on each side of the track. In the succeeding thirty-six years, Congress, by a series of special acts, authorized the construction and operation of railroads,[3] and in 1902 it passed a general statute concerning future railroad construction in the Indian territory.[4] The 1902 Act included a provision, § 16, that railroads should pay a fixed annual sum per mile to the Secretary of the Interior for the benefit of the tribes.

The Indians allege that the railroads have not complied with the terms of the treaties and statutes in that they have taken and held certain station reservations unnecessary for railroad purposes for their own benefit, that they have received rents and profits from the use of these lands, and that they have failed to pay the annual mileage charge.[5] They ask that the government indemnify them for the value of the lands allegedly wrongfully taken, for rents and profits accruing to the railroads from their use of those lands, and for the mileage charge.

It must be emphasized that this action is brought, not against the railroads which have committed the asserted misdeeds, but against the government for its failure to collect the sums claimed for the petitioners from the railroads. The question for decision here, therefore, is whether, assuming arguendo that the railroads

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[2] 14 Stat. 755. (Seminole), 785 (Creeks). The treaties are sufficiently similar so that hereafter reference will be made to the Creek treaty only.

[3] The treaty was originally interpreted as permitting the construction of only two railroads through the territory. Letter of the Secretary of the Interior to the President, May 21, 1870, approved by him May 23, 1870, referred to at 13 O. A. G. 285 (1870). In the 1880's Congress began, in a series of special acts, to authorize construction of railroads through the Indian Territory on a theory of eminent domain. Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641. See e. g. the Committee Report and discussion of the bill granting a right of way to the Gulf, Colorado, and Santa Fe Railway, 15 Cong. Rec. 4711 *et seq.* (1884). Approximately one half of the railroads involved in the instant case appear to have been authorized by special acts and to have been constructed prior to the general act of 1902. For a general history of railroads in Oklahoma see Bulletin No. 60, The Railway and Locomotive Historical Society, "The Railroads of Oklahoma", published through the Baker Library of the Harvard Business School (1943).

[4] An Act regulating general construction of railroads through Indian lands was first adopted in 1899, 30 Stat. 990. The 1902 Act was more particularly directed at construction through the territory of the Five Civilized Tribes, of which petitioners are two.

[5] Under an opinion of the Secretary of the Interior the obligation to make this payment terminated upon the admission of Oklahoma as a state in 1907, 38 Decisions of Secretary of the Interior (Public Lands) 414.

are at fault, the government was obligated to compel restitution or to recover damages; and if the government failed to do these things, whether it had a duty to make the Indians whole. We are asked to find an agreement to indemnify the tribes for these losses in the Treaty of 1866, the Act of 1902, and an Act of 1906.

First. The Treaty of 1866. Article I of the Treaty provided:

"[The Creeks] also agree to remain at peace with all other Indian tribes; and, in return, *the United States guarantees them quiet possession of their country*, and protection against hostilities on the part of other tribes. In the event of hostilities, the United States agree that the tribe commencing and prosecuting the same, shall, as far as may be practicable, make just reparation therefor." (Emphasis added.)

The petitioners contend that the government failed to prevent the railroads from taking and holding station reservations later found to be unnecessary for railroad purposes, and that it thus became liable to the petitioners for breach of the guarantee of "quiet possession".

The Court of Claims concluded that the guarantee of quiet possession applied only to protection from hostilities by other tribes. Such a conclusion receives support from a consideration of the circumstances of the time, for inter-tribal warfare was a dominant danger. Some of the tribes had fought on each side in the Civil War, and strange new tribes were about to be settled on adjacent land. The turmoil of reconstruction called for military protection.

We conclude that, whether or not the guarantee is limited to military protection, this language did not obligate the United States to compensate the tribes for encroachments by railroads acting under color of right. Keeping the peace and protecting the Indians was a difficult, and at times almost impossible, task,[6] and we cannot assume that the government meant to guarantee reparations for breach of quiet possession without a single explicit word in the Treaty to that effect. Where reparations were planned,

[6] "The treaties of 1866, and other treaties also, guarantee to the five civilized tribes the possession of their lands; but, without the moral and physical power which is represented by the Army of the United States, what are these treaties worth as a protection against the rapacious greed of the homeless people of the States who seek homesteads within the borders of the Indian Territory? If the protecting power of this Government were withdrawn for thirty days, where would the treaties be, and the laws of the Indians and the Indians themselves?" Report of the Commissioner of Indian Affairs in 1 Report, Secretary of the Interior (1886), 81.

clear language was used. Thus in the section quoted above hostile tribes, and not the government, were explicitly made liable for the tribe's depredations. There is no such provision putting a similar liability for losses of any sort on the United States.[7] A promise by the government to try to keep the peace is not equivalent to a promise to make payments if the peace is not kept; "and before any judgment should be rendered binding the United States it is familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate." *Leighton* v. *United States*, 161 U. S. 291, 296, 297.

This conclusion does not mean that the United States in signing the treaty made an empty promise. The government undertook to use its military power to protect the Indians against military aggression, and in addition it undertook through its administrative and legislative policy to aid the tribes to hold possession of their lands. In view of the pressures of the time, it appears to have treated its obligation with real care. The acts providing for the construction of the railroads, for example, provided for payment to the Indians for the land taken,[8] attempted to restrict the amount granted to that necessary,[9] and usually provided for reversion of title to the Indians upon discontinuance of the road.[10]

[7] The only instance which has been called to our attention in which the United States specifically guaranteed to bring civil actions for the benefit of a tribe and insured payment for trespasses is the treaty of May 24, 1834, with the Chickasaws, 7 Stat. 450.

[8] The Act of July 27, 1866, 14 Stat. 292, § 7, authorizing the construction of a railroad through the Indian country provided for a jury trial to determine the fair price. See, for example of the liberal construction given a similar provision in 23 Stat. 73, Cherokee Nation v. Southern Kansas Ry., 135 U. S. 641, 651-653. Another act passed in 1866, 14 Stat. 289, § 8, provided that the railroad should be constructed "with the consent of the Indians, and not otherwise."

[9] Note, for example, in the Congressional discussion of the bill authorizing construction of the Gulf, Colorado and Santa Fe Railway, an Oklahoma railroad not directly involved here, the debate over the amount of land necessary for sidings. 15 Cong. Rec. 4715-4718 (1884).

[10] The experience of one of the first of the two roads authorized under the treaty is revealing of the manner in which the use of the Indian lands was supervised: The Atlantic and Pacific Railroad was authorized to build a line by an 1866 act, 14 Stat. 292. In 1871, after small parts of the line had been completed, it was ordered to cease work by the Secretary of the Interior and was not allowed to continue until it had posted a bond for the protection of Indian interests. See discussion at Atlantic and Pacific R. R. v. Mingus, 165 U. S. 413, 417. Failure to complete the road resulted in an 1886 Act taking the lands previously granted back into the public domain, 24 Stat. 123, and the road was ultimately completed by the St. Louis and Oklahoma City Ry. Co. under an 1896 special act, 29 Stat. 69. Section 2 of that Act provides for reversion to the tribes of lands not used for railroad purposes.

In 1871, upon appeal of the tribes, the Secretary of the Interior refused to permit a road to enter the territory because of a claimed violation of the treaty.[11] The guarantee of quiet possession called for a series of legislative, administrative, and military judgments, but was not a pledge of monetary reparation.

Second. The Act of February 28, 1902. The petitioners rest on §§ 15 and 16 of the Act of 1902. Section 15 provides that the tribes through whose land the roads were to be built should be compensated by the railroads for the land taken. The section established a system of valuation under judicial supervision and with a right of appellate review. These elaborate provisions provide an adequate method by which the tribes might protect their own interests, but contain no indication of any kind that the government should pay for the lands taken.[12]

Section 16 provides that "where a railroad is constructed under the provisions of this Act there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular tribe or nation through whose lands any such railroad may be constructed, an annual charge of fifteen dollars per mile. . . ." Petitioner contends that this direction to the Secretary to accept these payments made the government an insurer of their collection.

Variants of this statutory phase were used generally in acts authorizing railroad construction after 1884. The Act of 1902, as has been noted, was the successor to the general railroad authorization act of 1899, which in 30 Stat. 990, § 5, required "such an annual charge as may be prescribed by the Secretary of the Interior, not less than $15.00 for each mile." Other acts of the period varied in that the Secretary was directed to apportion the sum collected among several tribes according to their interests.[13] Some of the earlier acts mentioned no specific sum, giving the Secretary complete discretion as to the amount to be collected and the method of allocating it.[14] This device of assessment of an

[11] Lotter, Secretary of the Interior, May 21, 1870, *supra*, note 3.

[12] Whether added obligations in connection with this section were assumed by the United States in the 1906 Act is considered below.

[13] See, e. g., the act authorizing construction of the Kansas and Arkansas Valley Railroad, 24 Stat. 73, § 5 (1886), or the act authorizing construction of a branch of the St. Louis and San Francisco Railroad, 29 Stat. 80, § 5 (1896).

[14] The act authorizing construction of a railroad through the Papago (Arizona) reservation provided: "Such compensation as may be fixed by the Secretary of the Interior be paid to him by the said railroad company, to be expended by him for the benefit of the said Indians." 22 Stat. 299 (1882).

annual charge payable to the Secretary was also used in authorizing construction of telephone and telegraph lines across Indian lands, 25 U. S. C. § 319.

By the time of the adoption of the 1902 Act, the verbal formula used in § 16 was so familiar that it required no discussion in Congress. The clause seems first to have been used in an act of 1884, 23 Stat. 69, § 5, authorizing the Gulf, Colorado, and Santa Fe Railway to cross the Indian territory. The $15.00 charge was considered a tax, approximately equal to the taxes charged by neighboring states.[15] No word was said indicating that the United States, acting as a voluntary tax collector for the tribes, meant to guarantee to the tribes that the taxpayers would make their payments when due.

Considering § 16 in its relation to the other statutes of the period, many of which through minor variations gave wide discretion to the Secretary of the Interior, we conclude that the words of this section were a direction to the Secretary to make the facilities of his office available for the payment of a form of tax. It provides that the railroads shall pay the tax to the Secretary, but puts no mandatory duty on the Secretary to do the work of collecting. We cannot suppose from any evidence before us either of legislative history or administrative practice that the United States repeatedly assumed obligations to indemnify the Indian tribes for charges which railroad companies, telephone companies, and telegraph companies constructing lines across Indian lands may have failed to pay. Cf. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421.

Third. The Act of 1906. Congress at one time planned to terminate the existence of the Five Civilized Tribes in 1906, and the Act of 1906 was introduced into the House of Representatives with the object of preserving Indian interests after tribal dissolution. In the course of discussion, Congress determined to continue the tribal existence, and the Act was amended to that effect before passage. The petitioners' final reliance is on sections 11 and 18 of this Act.

The relevant portion of Section 11 of the Act is as follows:

> "All revenues of whatever character accruing to the Creek and Seminole tribes, whether before or after dissolu-

[15] See discussion in the House of Representatives, 15 Cong. Rec. 4723-4727. For an analysis of the nature of this tax see the Opinion of the Secretary of the Interior, *supra*, note 5.

tion of the tribal governments, shall . . . . be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him."

The petitioner contends that under this section the government is liable for rents and profits on the station reservations allegedly wrongfully taken and wrongfully used by the railroads.

This language, like that of § 16 of the 1902 Act which it so closely resembles, does not make the government a guarantor that sums owing will be paid. The claim asserted is in essence one of damages for trespass, and assuming that the proceeds of a trespass action are to be considered "revenue", the Secretary was surely entitled to discretion as to which trespass actions he might consider worth bringing. In so far as the petitioner contends that the railroads wrongfully took lands under pretense of right in their original grants under the statutes, the administrative machinery provided by the acts gave the tribes adequate redress through the courts at the time the land was taken.[16] As to trespasses which may have been committed by the railroads without compliance with the forms of the authorizing Acts, or as to holdings, once proper, which the railroads may have retained after the rights to them had expired, we find no absolute duty on the Secretary to obtain compensation.

That the Secretary's duty to collect revenues and institute actions under the Act was discretionary is made clear by § 18:

"The Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the . . . . Creek, or Seminole tribes, respectively . . . . for the collection of any moneys or recovery of any land claimed by any of said tribes. . . . ."

The petitioners contend that under this section the Secretary was obligated to bring suit for all damages suffered by the tribes for failure to pay sums owing under §§ 15 and 16 of the 1902 Act, for trespass and mileage taxes, for any breach of the treaty, and for rents and profits collected by the railroads. But the use of the word "authorized" in this context necessarily reserved to the Secretary the right to determine his own course of action. It must be remembered that the Secretary was traditionally given wide discretion in the handling of Indian affairs[17] and that discretion would seldom be more necessary than in determining

[16] See for example § 15 of the 1902 Act.

[17] Cohen, Handbook of Federal Indian Law, "The Range of Administrative Powers", 100 *et seq.*

when to institute legal proceedings. For example, a railroad might have become bankrupt or reorganized before a failure to make proper payments was discovered,[18] making recovery impossible; and we can not suppose that the Secretary might not compromise difficult cases without bringing suit.

That the government did not mean to assume an insurer's responsibility for the payment of sums claimed by the Indians against the railroads is further shewn by the fact that the Indians retained their own independent remedy for wrongs done them. The tribes have not yet been dissolved, and they have had, both as a general legal right[19] and by virtue of the very section of the 1906 Act under discussion here, the power to bring actions on their own behalf. That the United States also had a right to sue did not necessarily preclude the tribes from bringing their own actions.[20]

We are asked here to impose a liability on the government to these Indians for wrongs allegedly committed against the Indians by others. Appreciating the desire of Congress to recognize the "full obligation of this nation to protect the interests of a dependent people," *Tulee* v. *Washington*, 315 U. S. 681, 685, we are unable to find in the words of the treaties or statutes upon which this action rests any such prodigal assumption by the government of other people's liabilities as that for which the petitioners contend here.

Affirmed.

MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case.

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[18] The Oklahoma properties of the St. Louis and San Francisco Railway Co. were held by 25 different corporations between 1866 and 1916. The Atchison, Topeka, and Santa Fe, not directly involved in this action, is the descendant of 64 railroads with Oklahoma holdings. Approximately 150 railroads have existed in Oklahoma. See "The Railroads of Oklahoma", *supra*, note 3, pp. 28-77.

[19] Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641; Cherokee Nation v. Hitchcock, 187 U. S. 294; Lone Wolf v. Hitchcock, 187 U. S. 553. Cf. Lane v. Pueblo of Santa Rosa, 249 U. S. 110 and United States v. Candelaria, 271 U. S. 432.

[20] Cf. Heckman v. United States, 224 U. S. 413, 446; United States v. Osage County, 251 U. S. 128; Sunderland v. United States, 266 U. S. 226.

SUPREME COURT OF THE UNITED STATES.

Nos. 321 and 322.—October Term, 1942.

321	The Creek Nation, Petitioner, *vs.* The United States.	On Writs of Certiorari to the Court of Claims.
322	The Seminole Nation, Petitioner, *vs.* The United States.	

[April 5, 1943.]

Mr. Justice Murphy, dissenting.

As a people our dealings with the Indian tribes have been too often marked by injustice, neglect and even ruthless disregard of their interests and necessities. As a nation we have incurred moral and political responsibilities toward them and their descendants which have been requited in some measure by treaties and statutes framed for the protection and advancement of their interests. Those enactments should always be read in the light of this high and noble purpose, in a manner that will give full scope and effect to the humane and liberal policy that has been adopted by the Congress to rectify past wrongs.[1]

Each railway company whose road was constructed under the Act of 1902[2] was required by § 16 of that Act to pay to the Secretary of the Interior, for the benefit of the particular tribe through whose lands the road passed, an annual charge of fifteen dollars for each mile of road constructed. By the Act of 1906 it was provided that all revenues accruing to the Five Civilized Tribes "shall . . . be collected by an officer appointed by the Secretary of the Interior", and the Secretary was authorized to bring suit in the name of the United States for the use of any one of the five tribes to collect any moneys claimed by it.[3] For failure of the Secretary of the Interior to collect these mileage charges

[1] Choctaw Nation v. United States, 119 U. S. 1, 27-28; Seminole Nation v. United States, 316 U. S. 286, 296-97.

[2] Act of February 28, 1902, 32 Stat. 43.

[3] §§ 11 and 18 of the Act of April 26, 1906, 34 Stat. 137, 141, 144.

for the Creek and Seminole tribes, among other things, this action is brought under jurisdictional acts[4] which authorize the Court of Claims to hear and determine all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and those tribes, or out of any act of Congress relating to Indian affairs.

We have held that the Government in its relations with the Indian tribes occupies the position of a fiduciary, that the relationship is similar to that of guardian and ward, and that the duties and responsibilities of the United States toward its wards require a generous interpretation.[5] If it is the duty of a guardian or trustee, as I conceive it to be, to exercise diligence to conserve and protect the interests of his trust, and collect moneys due to the estate of his ward, then such a duty may well have arisen under § 16 of the Act of 1902, a duty which, it is alleged, the Secretary of the Interior failed to discharge. In other words, if the railroads failed to pay to the Secretary the required annual charges for each mile of road constructed, it was the Secretary's duty to act to protect the Indian beneficiaries who should not be expected to assume the burden of acting on their own behalf, especially when the payments were to be made to the Secretary and not to them. Cf. *United States v. Creek Nation*, 295 U. S. 103, 110. To read the Act of 1902 otherwise is to take too restricted a view of the obligations of the United States toward a dependent people. But if there were any doubt, the duty of the Secretary of the Interior to collect the mileage charges was made plain and unmistakable by the Act of 1906 which required him to collect all revenues accruing to the tribes and specifically authorized him to bring suit on their behalf. The present claim to mileage charges undoubtedly is an equitable one arising out of those statutes and is therefore within the scope and purpose of the jurisdictional acts.

In my opinion the petitioners state a cause of action with respect to these mileage claims and the judgment of the Court of Claims should accordingly be reversed.

Mr. Justice FRANKFURTER agrees with these views.

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[4] Act of May 20, 1924, 43 Stat. 133 (Seminole), and Act of May 24, 1924, 43 Stat. 139 (Creek).

[5] See Note 1, *ante*.